1889

BANK OF BENGAL v. KARTIC CHUNDER ROY.

three, but he has made it a condition of the judgment that no execution is to issue against the endorser until the holder has exhausted his remedies against the drawer and acceptor. We are unable to agree with the learned Judge that he had power to place such a condition upon the holder in this case. The law entitles the holder of a bill of exchange to sue all the parties in one action or in separate actions; and, having brought his suit, the judgments are practically separate, and may be enforced against each or all of the parties. We think then that the Judge was wrong in imposing this condition, and this appeal to amend the decree by striking out that condition must be decreed, but without costs. *Appeal allowed.*

Attorneys for the Appellants: Messrs. *Morgan & Co.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1889
June 25.

JONARDON MUNDUL DAKNA AND ANOTHER (PLAINTIFFS) *v.* SAMBHU NATH MUNDUL AND OTHERS (DEFENDANTS). *

Arbitration—Award on one point only—Remission to arbitrator—Refusal by Arbitrator to act—Limitation—Adverse possession.

Several points arising in a suit were referred for decision to an arbitrator. The arbitrator made his return, deciding by the award one only of the points referred to him, *viz.*, that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord.

The Munsiff remitted the award to the arbitrator for determination of the other matters originally referred to him; the arbitrator, however, refused to act further in the matter, and the Munsiff himself took up the case and decided it in favour of the plaintiff. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsiff, and gave the defendants a decree in terms of the award.

Held, that as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that

* Appeal from Appellate Decree No. 1761 of 1888, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 7th of August 1888, reversing the decree of Baboo Gopal Kristo Ghose, Munsiff of Narrail, dated the 13th of February 1888.

the Munsiff had acted rightly, on the arbitrator declining to award, in deciding the case himself.

THIS was a suit to recover possession of certain lands by the plaintiffs under a lease granted in the year 128[illegible]. The plaintiffs alleged that they had been dispossessed therefrom by the defendants on the 23rd Bysack 1292. The defendants claimed the land as being within their *jamma*, alleging that they held it under the same landlord through whom the plaintiffs claimed, and denied that the plaintiffs had ever been in possession thereof, and pleaded limitation. The issues framed were:—

(1) Is the suit barred by limitation?

(2) Has the plaintiffs a *jammai* right to the disputed lands, and were they in possession and dispossessed thereof?

(3) Have the defendants a *jammai* right to the said lands?

(4) What are the correct south and west boundaries of the land.

The case was then referred to arbitration.

The arbitrator submitted his award, finding that the defendants had been in possession for more than twelve years, and made no return of any finding on the other issues. The matter then came up before the Munsiff for final disposal, and he referred the matter back to the arbitrator for determination of the other questions. The arbitrator, however, refused to move further in the matter; and the Munsiff therefore tried the case himself, and decided the case in favour of the plaintiffs.

The defendants appealed to the Subordinate Judge who held that the award was perfectly legal, and that it could not be set aside by the Munsiff on the ground that the arbitrator had not decided all the points referred to him; the point decided by him being sufficient for the dismissal of the plaintiffs' claim; and he therefore directed that the plaintiffs' suit should be dismissed in terms of the award filed by the arbitrator.

The plaintiffs appealed to the High Court.

Baboo *Chunder Kant Sen*, for the appellants, contended that it was open to the Munsiff to remit the award under s. 520 of the Code of Civil Procedure; and that, on the arbitrator refusing to re-consider the matter, the only course open to the Munsiff was to try the case himself; he further submitted that

Judge should, at all events, have tried the ...its.

Latoo Behari Bose for the respondents.

The judgment of the Court (GHOSE and GORDON, JJ.,) was delivered by

GHOSE, J.—This appeal arises out of a suit brought by the plaintiffs to recover possession of certain lands which they alleged had been demised to them by a certain landlord in the year 1289. The defence was, that the defendants had held the land in question from a period prior to the execution of the lease in 1289 as a part of his *jammai*, and therefore the plaintiffs had no right to recover. They also pleaded that they were in possession of the land for more than twelve years, and therefore the plaintiffs' claim was barred by limitation.

Upon this state of the pleadings, certain issues were raised between the parties in the Court of first instance: one was as to limitation, and another as to the titles of the plaintiffs and the defendants respectively. Upon the application of both parties, the case was referred to arbitration; but the arbitrator to whom the case was referred confined his award only to the question of limitation, he being of opinion that the defendants had held possession of the land in suit for more than twelve years, and that the plaintiffs' allegation, that they had been in possession of it for some time and had been subsequently dispossessed, was not made out

The matter then came before the Munsiff for final disposal. That officer was of opinion, and we think rightly of opinion, that the award given by the arbitrator had left undetermined some of the matters which had been referred to him for decision, and we may here observe that the second and third issues laid down by the Munsiff were issues which were essentially necessary for the determination of the case. Being of that opinion, the Munsiff remitted the case to the arbitrator with the view that the other issues in the case might be determined.

The arbitrator, however, declined to act further in the matter, and sent the case back to the Munsiff. In this state of things, the Munsiff had no alternative but to try the case out himself,

and being of opinion that the plaintiffs' case and that the defendants had no *jamma'i* right in question, he gave a decree to the plaintiffs.

The Subordinate Judge, on appeal, expressed himself as follows: "The arbitrator found as a fact, that the defendant had been in possession for more than twelve years, and submitted his award against the plaintiffs. The award was perfectly legal, and was supported by the fact found, and it could not be set aside merely on the ground that the arbitrator had not decided all the points referred to him. The point decided by him was sufficient for the dismissal of the claim, and there was no necessity for any decision on the other points. The lower Court ought to have disposed of the case according to the award which was perfectly legal." He therefore set aside the order of the lower Court, and directed that the case should be disposed of in terms of the award filed by the arbitrator.

It seems to us that the view which the Subordinate Judge took is not the correct one; and that, in the circumstances of this case, the Munsiff was right in remitting the case to the arbitrator for determining the points which he had left undetermined. It will be observed that the lease under which the plaintiffs claimed the property was one granted in 1289, *i.e.*, within twelve years of the institution of the suit. The defendants no doubt plead the law of limitation, but they admit that the person who granted this lease to the plaintiffs is the person under whom they have been holding the land as tenants. It follows therefore that, if the defendants had been holding the land adversely to anybody for more than twelve years, it must have been their own landlord. But there could be no adverse possession against the landlord, and the defendants could not acquire a title against him. And if the landlord had brought a suit to eject them, they could not have successfully set up the plea of limitation. It has been found that the landlord gave the lease to the plaintiffs in 1289, and they bring this suit, upon the basis of that lease, to recover possession, and upon the ground that the defendants have no title to the land; and the whole question between the parties seems to be, whether the title of the plaintiffs or of the defendants is to prevail.

...ore of opinion that the case could not be con-...le finding that was come to by the arbitrator upon ...ion of possession, and that the Munsiff was right, when ...rbitrator declined to complete the award, in deciding the ...se himself.

Accordingly, we direct that the case be sent back to the Subordinate Judge, with the view that he should re-try the appeal on its merits. The costs will abide the result.

Case remanded.

T. A. P.

END OF VOL. XVI.